

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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PATRICK JORDAN,

97 CV 3235

Petitioner,

MEMORANDUM

-against-

AND
ORDER

UNITED STATES OF AMERICA,

Respondent.

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PATRICK JORDAN
No. 36709-053
Unit 5711-315
P.O. Box 2000 East
Fort Dix, New Jersey 08640
petitioner pro se

ZACHARY W. CARTER, United States Attorney
Eastern District of New York
(Gary R. Brown, of counsel)
One Pierrepont Plaza
Brooklyn, New York 11201
for respondent

NICKERSON, District Judge:

Petitioner pro se brought this proceeding to set aside his sentence pursuant to 28 U.S.C. § 2255. The court denied the petition on the merits on April 23, 1998.

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In light of the order of the Court of Appeals for the Second Circuit dated June 4, 1998 directing the court to clarify the status of the § 2255 petition, the court reenters its April 23, 1998 order, which reads as follows:

"In 1991 petitioner pleaded guilty to charges of conspiracy to possess and distribute heroin in violation of 21 U.S.C. § 846. On October 27, 1995 the court sentenced him to time served and to five years of supervised release, subject to petitioner performing 400 hours of community service and being prohibited from possessing a firearm. On November 20, 1995 the court modified petitioner's conditions of supervision for petitioner to participate in a substance abuse treatment program.

"On March 29, 1996 the court held a hearing at which it found that petitioner had violated the conditions of his supervised release term. The court restored petitioner to supervised release for the original term imposed, and directed him to perform 400

hours of community service, to submit to drug testing, and to report to the Probation Department.

"Following a hearing in this court on February 21, 1997 petitioner was found guilty of violating the terms of his supervised release. The court sentenced him to a two-year term of imprisonment. Petitioner filed an appeal in the Court of Appeals for the Second Circuit. On June 4, 1997, while the appeal was pending, petitioner brought this proceeding.

"On January 8, 1998 petitioner brought a petition for a writ of mandamus. The Court of Appeals for the Second Circuit issued a mandate dismissing the petition without prejudice to the filing of a new mandamus petition if the district court did not act on the habeas petition within 60 days. On February 27, 1998 this court dismissed the habeas petition because it had been filed while an appeal on substantially the same issues was pending.

"Petitioner moved for reconsideration of this court's order on the basis that the Court of Appeals had denied his appeal on August 15, 1997, and thus the

appeal was no longer pending when the court dismissed his petition. On March 10, 1998 petitioner also filed a notice of appeal of the court's February 27, 1998 order.

"On March 31, 1998 the court denied petitioner's motion for reconsideration, but stated that it would consider the merits of the underlying petition once petitioner's file was returned to the district court. The file is now before the court, and the court will proceed to the merits of the petition.

"Petitioner says that the court erred by sentencing him to a two-year term for violation of his supervised release. He says that because the sentence was not within the range suggested by the policy statements in Chapter Seven of the United States Sentencing Guidelines (the Guidelines) it violated his right to due process of law and constituted an abuse of discretion by the court.

"Petitioner's claim is without merit. The policy statements of Chapter Seven of the Guidelines are 'advisory, rather than binding.' United States v.

Anderson, 15 F.3d 278, 284 (2d Cir. 1994). The court is required only to consider the applicable policy statements, and may then impose a sentence that falls within the statutory maximum and is reasonable. See id.

"The court stated explicitly at the hearing that it had considered the policy statements and would depart from them. The sentence imposed was within the statutory maximum of twenty-four months authorized by 18 U.S.C. § 3583(e)(3), and was reasonable in light of the deliberate nature of petitioner's repeated violations of the conditions of his supervised release.

"Petitioner also says that he received ineffective assistance of counsel at the hearing and sentencing, based in part on counsel's failure to request a continuance to investigate petitioner's mental competency. Petitioner claims that pressures at home and at work caused him to suffer from depression.

"The court has reviewed the hearing transcript and finds that counsel represented petitioner vigorously and competently. The court also examined the medical

evidence submitted by petitioner. The evidence shows that petitioner sustained an injury to his left foot, and suffered from sinusitis and migraine headaches, sometimes associated with nausea and dizziness. There was no basis for petitioner's counsel to request a psychiatric evaluation of petitioner. Petitioner has not shown that counsel's conduct was deficient, see Strickland v. Washington, 466 U.S. 668, 700, 104 S. Ct. 2052, 2071.

"The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of denial of a constitutional right. See 28 U.S.C. § 2253; Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996)."

So ordered.

Dated: Brooklyn, New York
June 19, 1998


Eugene H. Nickerson, U.S.D.J.